cautious in so doing. Unless the case is entirely clear their interference would be usurpation.

In the present case there can be no question that the legislature decided wisely and well. This railroad will unquestionably develop lands now comparatively valueless, and add millions to the taxable capital of the state. A legislature can hardly go amiss on this point.

If, indeed, private corporations are to become unduly rich by running these roads; if the success of such companies in that business is so assured as that all risk of loss is gone; then it may be the duty of the state to limit their profits or otherwise curtail the privileges granted. But this is a matter for the legislature, not the courts. Unwise legislation is one thing, unconstitutional legislation is another.

S. T.

RECENT AMERICAN DECISIONS.

Supreme Court of Michigan.

CITY OF DETROIT *v.* BLAKEBY AND WIFE.

A municipal corporation is not liable, in a private action for damages, for injuries caused by neglect to keep its streets in repair.

The cases founded on mere neglect to repair, and on acts of positive misfeasance reviewed and distinguished by CAMPBELL C. J.

This was an action by defendants in error, against the city of Detroit, for damages received from the defective condition of a cross walk. In the Wayne Circuit Court the defendants in error had a verdict and judgment, to which the city took this writ of error.

The opinion of the court was delivered by

CAMPBELL, C. J.—The principal question in this case is, whether the city of Detroit is liable to a private action of an injured party for neglect to keep a cross walk in repair. The other questions involve an inquiry into the circumstances which would go to modify any such liability in the present case.

There has been but one case in this state decided by this court, where the claim for damages arose purely out of a neglect to repair. In *Dewey* v. *Detroit*, 15 Mich., 307, such a suit

was brought but it did not call for a decision upon the main question. In *Township of Niles* v. *Martin*, 4 Mich., 557, it was held there was no such liability in a township, and this case was followed by us at the present term in *Township of Leoni* v. *Taylor*. It was held in *Larkin* v. *Saginaw County*, 11 Mich., 88; that a county could not be sued for directing a bridge to be built on a plan that was defective and injurious. In *Pennoyer* v. *Saginaw City*, 8 Mich., 534, a city was held liable for continuing a private nuisance which it had created, and in *Corey* v. *Detroit*, 9 Mich., 165, the city of Detroit was held liable for an accident caused by leaving an excavation in a street for a sewer, imperfectly guarded. In *Dermont* v. *Detroit*, 4 Mich., 135, it was held the city was not liable for the flooding of a cellar by a sewer, into which it drained. None of those cases presented the precise question raised here, and we are required therefore to consider it as an original inquiry, except in so far as it may be affected by any principles involved in the cases already decided.

The streets of Detroit are public highways, designed like all other roads for the benefit of all people desiring to travel upon them. The duty or power of keeping them in proper condition is a public and not a private duty, and it is an office for the performance of which there is no compensation given to the city. Whatever liability exists to perform this service to the public, and to respond for any failure to perform it, must arise, if at all, from the implication that is claimed to exist in the nature of such a municipality.

There is a vague impression that municipalities are bound in all cases to answer in damages for all private injuries from defects in the public ways. But the law in this state and in most parts of the country, rejects this as a general proposition, and confines the recovery to cases of grievances arising under peculiar circumstances. If there is any ground for recovery here, it is because Detroit is incorporated, and it depends therefore on the consideration whether there is anything in the nature of incorporated municipalities like this which should subject them to liabilities not enforced against towns and counties.

The cases which recognize the distinction apply it to villages and cities alike.

It has never been claimed that the violation of duty to the public was any more reprehensible in these corporations than outside of them; nor that there was any more justice in giving damages for an injury sustained in a city or village street, than for one sustained outside of the corporate bounds. The private suffering is the same and the official negligence may be the same. The reason, if it exists, is to be found in some other direction, and can only be tried by a comparison of some of the classes of authorities which have dealt with the subject in hand.

It has been held that corporations may be liable to suit for positive mischief produced by their active misconduct, and not by mere errors of judgment, and while the application of this rule may have been of doubtful correctness in some cases, the rule itself is at least intelligible and will cover many decisions. It was substantially upon this principle that the case of *Detroit* v. *Corey* was rested by the judges who concurred in the conclusion. *Thayer* v. *Boston*, 19 Pick., 511, was a case of this kind, involving a direct encroachment on private property. *Rochester White Lead Co.* v. *City of Rochester*, 3 N. Y., 465, where a natural water course was narrowed and obstructed by a culvert entirely unfit for its purpose and not planned by a competent engineer, is put upon this ground in the decision of *Hickox* v. *Plattsburg*, cited 16 N. Y., 161; *Lee* v. *Village of Sandy Hill*, 40 N. Y., 422, involved a direct trespass.

The injuries involved in these New York and Massachusetts cases referred to, were not the result of public nuisances, but were purely private grievances. And in several cases cited on the argument, the mischiefs complained of were altogether private. The distinction between these and public nuisances or neglects, has not always been observed and has led to some of the confusion which is found in the authorities. In all the cases involving injuries from obstructions to drainage, the grievance was a private nuisance. In case of *Mayor* v. *Furge*, 3 Hill, 612, which has been generally treated as a leading case, the damage was caused by water backing up from sewers not

kept cleaned out as they should have been: *Barton* v. *Syracuse*, 36 N. Y., 54, involved similar questions as did also *Childs* v. *Boston*, 4 Allen, 41. These cases do not harmonize with *Dermont* v. *Detroit*, 4 Mich., 135; but they rest on the assumption that having constructed the sewers voluntarily for private purposes, and not as a public duty, the obligation was complete to keep them from doing any mischief, as it would be in private persons. And in *Bailey* v. *Mayor*, 3 Hill, 538; S. C., 2 Denio, 433, the mischief was caused by the breaking away of a dam connected with the Croton water works, whereby the property of the plaintiff was destroyed. In this latter case the judgment rested entirely upon the theory that the city held the water works as a private franchise and possession, and subject to all the responsibilities of private ownership. The judges who regarded it as a public work, held there was no liability. In *Conrad* v. *Trustees of Ithaca*, 16 N. Y., 159, the facts were substantially like those in *Rochester White Lead Co.* v. *Rochester*, and the decision was rested on the principles of that case. DENIO, C. J., who delivered the opinion of the court, stated his own opinion to be, that there was no liability, but that he regarded the recent decision in another case referred to as establishing it, and in *Livermore* v. *Freeholders of Camden*, 29 N. J., 245, (and on Error, 2 Vroom 507) under a statute like that which was considered by this court in *Township of Leoni* v. *Taylor*, it was decided that while a passenger over a bridge could sue for injuries, yet where property adjacent was injured by the bridge, there was no remedy. Upon anything which sustains the liability for such grievances however, it is manifest that the injury is not a public grievance in any sense, and does not involve a special private damage, from an act that at the same time affects injuriously the whole people.

Another class of injuries involves a public grievance specially injuring an individual, arising out of some neglect or misconduct in the management of some of those works which are held in New York, to concern the municipality in its private interests, and to be in the law the same as private enterprises. It is held, that in constructing sewers and similar works, which can only be built by city direction, if the streets are broken up and inju-

ries happen because no adequate precautions are taken, the liability shall be enforced as springing from that carelessness, and not on the ground of non-repairs of highways. *Lloyd* v. *Mayor*, 5 N. Y., 369, and *Storrs* v. *Utica*, 17 N. Y., 104, were cases of this kind. In these cases, as in the case of *Detroit* v. *Corey*, the streets were held to have been broken up by the direct agency of the city authorities, and the negligence which caused the injury, was held to be negligence in doing a work requiring special care, or in other words, the wrong complained of was a misfeasance and not a mere omission. The case of *Weet* v. *Brockport*, 16 N. Y., 161, was also a case where SELDEN J., who reviewed and discussed all the decisions, said it was not necessary to consider the wrong complained of as a mere neglect of duty, because it was in itself a dangerous public nuisance, created by the corporation, and not in any sense a non-feasance. In *Delmonico* v. *Mayor*, 1 Sandf., 226, the injuries, though in a highway, consisted in crushing in a vault under the street, by improperly piling earth upon it while excavating for a sewer, and there was also a direct misfeasance.

The cases in which cities and villages have been held subject to suits for neglect of public duty, in not keeping highways in repair, where none of the other elements have been taken into the account, are not numerous, and all which quote any authority profess to rest especially upon the New York cases, except where the remedy is statutory. It will be proper therefore, to notice what those cases are, and upon what cases they are supported. The only cases of this kind decided in the courts of last resort, that we have been able to find, are *Hutson* v. *Mayor*, 9 N. Y., 163; *Hickox* v. *Plattsburg*, 16 N. Y., 161, and *Davenport* v. *Ruckman*, 37 N. Y., 568. This latter case resembles the one before us very closely in its leading features, and would furnish a very close precedent. It is not reasoned out at all, but refers for the doctrine to the other two cases, and to an authority in 18 N. Y., which does not relate to municipal liabilites. The case of *Hutson* v. *Mayor*, does not attempt to find any distinct foundation for the right of action, but refers to the cases in 3 Hill, and *Rochester White Lead Co.* v. *Rochester*, and *Adsit* v. *Brady*, 4 Hill, 630, as having established the liability.

This latter case is disapproved in *Weet* v. *Brockport*, and the others are sustained there on the ground of misfeasance, and as Judge DENIO, when the decisions in 16 New York were made, stated that he had not supposed there was any corporate liability for mere neglect to keep ways in repair, it is quite possible that the case of *Hutson* v. *Mayor* was regarded as distinguishable. The circumstances were very aggravated, as it would seem that the city had left a road too narrow to accommodate a carriage without any paving and without protection against the danger of falling down a deep embankment into a railroad excavation. The report is not as full as could be desired upon the precise state of facts. In the Supreme Court, where the judges differed in opinion, (two dissenting) the liability seems, from the view taken of that case by Judge SELDEN, to have rested on the ground that there had been a breach of private duty and not of duty to the public. If this was the view actually taken, it would not bring the case within the same category with the other road cases. But the case of *Weet* v. *Brockport*, 16 New York, 161, is recognized as the one in which the whole law has been finally settled, and it is upon the grounds there laid down, that the liability is now fixed in New York. The elaborate opinion of Judge SELDEN, which was adopted by the Court of Appeals, denies the correctness of the dicta in some of the previous cases, and asserts the liability to an action solely upon the ground that the franchises granted to municipal corporations are in law a sufficient consideration for an implied promise to perform with fidelity all the duties imposed by the charter, and that the liability is the same as that which attaches against individuals who have franchises in ferries, toll-bridges and the like. The principle as he states it, is:

"That whenever an individual or a corporation, for a consideration received from the sovereign power, has become bound by covenant or agreement, either express or implied, to do certain things, such individual or corporation is liable, in case of neglect to perform such covenant, not only to a public prosecution by indictment, but to a private action at the suit of any person injured by such neglect. In all such cases the contract

made with the soverign power is deemed to enure to the benefit of every individual interested in its performance."

In order to get at the true ground of liability, the opinion goes on to determine, first, whether townships and other public bodies, not being incorporated cities or villages, are liable, and shows conclusively that they are not, and the court arrives at this conclusion not on the basis of an absence of duty or an absence of means, but because their duties are duties to the public and not to individuals. Full citations are made from the English cases which were cited before us, and also from the American cases. The case of *Young* v. *Commissioners of Roads*, 2 N. & McC., 537, is cited approvingly, and the following language is quoted as expressing the correct idea: "When an officer has been appointed to act, not for the public in general, but for individuals in particular, and from each individual receives an equivalent for the services rendered him, he may be responsible in a private action for a neglect of duty, but when the officer acts for the public in general, the appropriate remedy for his neglect of duty is a public prosecution." In another part of the opinion, sheriffs are given as examples of the former and highway commissioners of the latter class of officers. The cases cited do not all require the consideration for the services to come immediately from individuals, but they all require the services to be due to individuals and not to the public, and to spring from contract. The English cases are reviewed in the *Mersey Dock Cases*, 1 H. of L. Cases, N. S., 93; 1 H. & N., 493; 3 Id., 164, and exemplify this. Thus the liability to repair a sea-wall is in favor of those who own the property adjacent; the liability to keep docks safe of access in favor of those who have occasion to require their use upon the customary terms; the liability to keep toll-bridges safe in favor of those who use them. But there is no instance of liability where the public is interested directly, and in those cases where the obligation rests upon the consideration of corporate franchises, the duty has always been towards individuals, although the consideration moved from the state. The decisions upon this sustain the views of Judge SELDEN concerning his premises, but there is

some difficulty in reaching his conclusions through them. It is admitted everywhere, except in a single case in Maryland, that there is no common law liability against ordinary municipal corporations, such as towns or counties, and that they cannot be sued except by statute. It has also been uniformly held in New York as well as elsewhere, that public officers whose offices are created by act of the legislature, are in no sense municipal agents, and that their neglect is not to be regarded as the neglect of the municipality, and their misconduct is not chargeable against it unless it is authorized or ratified expressly or by implication. This doctrine has been applied to cities as well as to all other corporations. *Barney* v. *Lowell*, 98 Mass., 570; *White* v. *Philipston*, 10 Metc., 108; *Mower* v. *Leicester*, 9 Mass., 247; *Bigelow* v. *Randolph*, 14 Gray, 541; *Wolcott* v. *Swanscott*, 1 Allen, 101; *Young* v. *Com'r of Roads*, 2 Nott & McCord, 537; *Pack* v. *Mayor*, 4 Seld., 222; *Martin* v. *Mayor of Brooklyn*, 1 Hill, 545; *Bartlett* v. *Crozier*, 17 J. R., 438; *Morey* v. *Newfane*, 8 Barb., 605; *Eastman* v. *Meredith*, 36 N. Y., 284; *Hyde* v. *Jamaica*, 27 Vt., 443; *Lorillard* v. *Town of Monroe*, 11 N. Y., 392; *Mitchell* v. *Rockland*, 52 Maine, 168—and the numerous cases which exonerate cities from liabilities for not enforcing their police laws so as to prevent damage, rest upon a very similar basis—*Howell* v. *Alexandria*, 3 Peters, 398; *Levy* v. *Mayor*, 1 Sandf. S. C., 465; *Proctor* v. *Lexington*, 13 B. Monroe, 509; *Howe* v. *New Orleans*, 12 La. Ann., 481; *Western Reserve College* v. *Cleveland*, 12 Ohio St., 375; *Brinkmeyer* v. *Evansville*, 29 Ind., 187; *Griffin* v. *Mayor*, 9 N. Y., 456. In the case of *Eastman* v. *Meredith*, 36 N. H., 284, the distinction between the English and American municipal corporations is clearly defined. The former often hold special property and franchises of a profitable nature, which they have received upon conditions, and which they can hold by the same indefeasible right with individuals. But American municipalities hold their functions merely as governing agencies. They may own private property and transact business not strictly municipal, if allowed by law to do so, just as private parties may, and with the same liability; but their public functions are all held at sufferance, and their duties may be multiplied and enforced at the pleasure

of the legislature. They have no choice in the matter; they have no privileges which cannot be taken away, and they derive no profit from their care of the public ways and the execution of their public functions. They differ from towns only in the extent of their powers and duties bestowed for public purposes, and their improvements are made by taxation, just as they are made on a smaller scale in towns and counties. In the case of *Bailey* v. *Mayor*, 3 Hill, 538, it was intimated by Judge NELSON that the state could not compel the city to accept its charter, and in *Child* v. *Boston*, 4 Allen, 41, the fact that the sewerage system had been left to vote and been accepted, was held to make it a private and not a public matter. The sewer cases have, in several instances, gone upon this latter notion. It is not necessary to discuss that question here, because streets are not private and because in this state at least, no municipality can exercise any powers except by state permission, and every municipal charter is liable to be amended at pleasure. The charter of Detroit has undergone most radical changes. It is impossible to sustain the proposition that those charters rest on contract, and it is impossible, as Judge SELDEN demonstrates, to find any legal warrant for any other ground for distinguishing the liability of one municipal body from that of another. There is no basis or authority for any such distinction concerning the consideration on which their powers are granted, and it rests upon simple assertion; and yet the decision stands in New York as authority for all that is claimed here, because, although in the case in which the opinion was given in the Supreme Court, it was not called for, yet in the case of *Hickox* v. *Trustees of Plattsburg*, 16 N. Y., 161, in which it was adopted as the opinion of the Court of Appeals, the mischief was a mere neglect to repair, when the street had been obstructed by an individual excavation for a short time.

It is impossible to harmonize the decision with the previous decisions exempting corporations from responsibility, because public officers were not their agents. It is no easier to sustain it in the face of the uniform decisions denying liability for failure to enforce their police regulations. The authorities which make corporations liable on the ground of conditions attached to

their franchises, go very far towards compelling them to respond as absolutely bound to prevent mischief, and the general reasoning on which most of the opinions rest, and the criticisms made upon former decisions—which it is asserted, went altogether too far in creating liability—all are designed to show, and do show very forcibly, that simply as municipal corporations apart from any contract theory, no public bodies can be made responsible for official neglect involving no active misfeasance.

There is no such distinction recognized in the law elsewhere. In *City of Providence* v. *Clapp*, 17 Howard, 161, the United States Supreme Court, through Judge NELSON, held that cities and towns were alike in their responsibilty and in their immunity. In *County officers of Anne Arundel* v. *Duckett*, 20 Md., 468, a county was held responsible to the fullest extent. In New Jersey in *Freeholders of Sussex* v. *Strader*, 3 Harrison, 108; *County Freeholders of Essex*, 27 N. J., 415; *Livermore* v. *Freeholders of Camden*, 29 N. J., 245, and 2 Vroom, 507, and *Pray* v. *Mayor of Jersey City*, 32 N. J., 394, the cases were all rested on the same principles, and cities were exonerated because towns and counties were. The suggestion of Judge SELDEN has been caught at by some courts since the decision, and has been carried to its legitimate results, as in *Jones* v. *New Haven*, 34 Conn., 1, where the damage was caused by a falling limb of a tree. But so far as we have seen, even the cases which are decided on this ground, do not hold that towns do not receive their powers upon a consideration as well as cities. That question still remains to be handled in those courts.

It is utterly impossible to draw any rational distinction on any such ground. It is competent for the legislature to give towns and counties powers as large as those granted to cities. Each receives what is supposed to be necessary or convenient, and each receives this, because the good government of the people is supposed to require it. It would be contrary to every principle of fairness, to give special privileges to any part of the people and deny them to others, and such is not the purpose of city charters. In England the burgesses of boroughs and cities have very important and valuable privileges of an exclusive nature and not common to all the people of the realm. Their char-

ters are grants of privilege and not mere government agencies. Their free customs and liberties were put by the great charter under the same immunity with private freeholds. But in this state and in this country generally they are not placed beyond legislative control. The Dartmouth College case which first established charters as contracts, distinguished between public and private corporations, and there is no respectable authority to be found anywhere which holds that either offices or municipal charters generally involve any rights of property whatever. They are all created for public uses and subject to public control.

We think that it will require legislative action to create any liability to private suit for non-repairs of public ways. Whether such responsibility should be created, and to what extent and under what circumstances it should be enforced, are legislative questions of importance and some nicety. They cannot be solved by courts.

Judgment reversed.

COOLEY J., dissented.

The foregoing case is one that cannot fail to be of interest to the profession, inasmuch as it concerns an important question affecting a great number of our municipalities to a very large extent, and is, at the same time, a departure from the doctrines, which have been supposed to have been adopted by the English courts and those of some of the American States The question is by no means free from difficulty; and we cannot fairly say that we have been able to devote sufficient time to an examination and analysis of the cases bearing upon the point, to enable us to speak confidently of the exact weight of authority against the decision here made. There seems to be no question, whatever, that the New York courts have adopted a rule upon the subject more in conformity with the dissenting opinion in this case than with that of the majority. In *Davenport* v. *Ruckman*, 37 N. Y., 568, the rule is thus stated: When the streets or sidewalks of the city of New York are out of repair through the neglect of the corporation, it is liable to an action for such neglect, at the suit of the person injured, whether the injury arises from some act done by the corporation, or from an omission of duty on their part. And the same doctrine is found in numerous earlier decisions in that state, most of which are referred to in the opinion in the case under review. The rule is thus stated in a late case in the Supreme Court of New York: "Whatever may be the case in regard to commissioners of highways in towns, a different and more stringent rule appears to have been applied to corporations and the trustees of a village:" *Hyatt* v. *The Trustees of the Village of Rondout*, 44 Barb., 385.

And in *Wendell* v. *The City of Troy*, 4 Keyes, N. Y. Court of Appeal, 261, the city was held responsible for an injury to the plaintiff, by means of the defective construction of a drain under the street, whereby it caved in, although built by a private person for his own convenience by permission of the city authorities. The New York cases seem to go the full length of making cities and villages responsible for all damage caused by any failure to perform the duties imposed by their charters, on the ground that having sought special acts of incorporation they are bound, as corporations, to the performance of all the duties imposed by such charters, as conditions voluntarily assumed by the corporations, impliedly at least, by reason of the acceptance of the charters containing such conditions. And the case of *Jones* v. *The City of New Haven*, 34 Conn., 1, seems to go much upon the same ground, except that there, the matter came specially under one of their own by-laws, in regard to which there might seem to be less question than if the duty had been imposed by the legislature as a public duty or burden.

The general doctrine that a public officer is not responsible for the misconduct of his subordinates, although his appointees, has been recognized from an early day: *Lane* v. *Cotton*, 1 Ld. Ray., 646, where the action was against the post-master general for the default of his deputies. The case of the *Mayor of Lyme Regis* v. *Henley*, 3 B. & Ad. 77; S. C., 2 Cl. & Fin., 331, was an action for injury to the defendant's land by reason of the plaintiffs failing to repair certain sea walls appertaining to their municipality, and which the condition of their charter obliged them to maintain and keep in repair. The case was first decided by the Common Pleas, in favor of the present defendant, 5 Bing., 91, and came for hearing on writ of error in the King's Bench. Lord TENTERDEN, Ch. J., gave judgment for the defendant, upon the ground that the corporation by accepting its charter became bound to perform all its conditions, and whoever suffered damage through any default in that respect, may have an action and the public may have redress for such defaults by indictment.

The subject has been more or less considered by the English courts since that time; but the case of the *Mersey Docks* v. *Gibbs*, and the same v. *Penhallow*, 1 H. Lds. Cases, N. S., 93—128; S. C., 1 H. & N., 439; 3 id. 164, seems to have put the question at rest there, so far as the points involved in the latter case are concerned. The injury complained of here occurred by reason of the docks being out of repair. The plaintiffs are a public corporation, created for the purpose of maintaining the harbor of Liverpool, and are required to maintain and keep in repair suitable docks and other harbor accommodations, for the use of which they are authorized to demand certain dues, which are intended to maintain the works, and are to be lessened whenever they produce more than is required for that purpose. The Court of Exchequer gave judgment in favor of the corporation, on the authority of *Metcalfe* v. *Hetherington*, 11 Exch., 258; but this judgment was reversed in the Exchequer Chamber; 3 H. & N. 164, and the judgment of the Exchequer Chamber affirmed in the House of Lords. The case of Gibbs was heard on demurrer to the declaration which contained the averment that the com-

pany knowing that the dock and its entrance was, by reason of accumulation of mud, unfit to be used by ships, did not take due and reasonable or any care to put it in a fit state, but negligently suffered the dock to remain in such unfit state, whilst, as they well knew, it was used by vessels, and that the damages arose in consequence.

The case in the Exchequer Chamber seems to have been decided upon the general ground that a corporation created for the purpose of maintaining public works, and receiving tolls or dues for the use of the same, is bound to see that such works are kept in a safe and fit condition for public use. This decision went upon the authority of *The Lancaster Canal Co. v. Parnaby*, 11 Ad. & El., 223, 242. And it was here considered that it made no difference whether the tolls were reserved for the benefit of the shareholders, as in the last case cited, or in a fiduciary capacity, as in the present case. And the House of Lords seem to have decided the case upon this view. Lord CRANWORTH, chancellor, said the destruction was one that could be held to affect the rights of those using the docks. Lord WENSLEYDALE said, if the question were *res integra*, and not settled by authority, he would be inclined to hold that it came within the principle of the cases where public officers have been held not liable to a private action for neglect of duty by servants appointed by them. But upon the former decisions he held the judgment below must be affirmed. And Lord WESTBURY fully concurred with the Lord Chancellor.

And it seems to us that this case is in itself no sufficient authority for holding cities and villages any more responsible for their streets and sidewalks being out of repair than are towns or counties, upon whom the duty of keeping highways in repair is imposed, where it has been long settled there is no responsibility for injuries occurring by want of repairs, unless imposed by statute. But the earlier English cases held a more stringent rule of responsibility in regard to cities and villages having special acts of incorporation, and chiefly upon the ground that they had accepted them voluntarily, and thus assumed the duties imposed by the charters thus accepted. How far this distinction is well-founded, it will not be altogether decisive of the question to inquire. For, since it has been long settled that such corporations are so responsible, it might not be entirely just to the public to now declare their irresponsibility, when, but for the rule of responsibility already established, the legislature might have provided for such responsibility by special enactments, as in the case of towns. For while it may be reasoned with great plausibility that there is no good reason, aside from the former decisions, to hold cities and villages to any higher degree of responsibility in regard to damages occurring by reason of their highways being out of repair, than towns are held; it may at the same time be urged with great propriety that they should be held to the same responsibility. But under the decision here made they could not be so held in most of the states. Since the legislatures have omitted in most cases, it is fair to presume, to impose the same duty by statutes upon cities and villages, which they do upon towns, on the ground that it is not required by reason of the general principles of the law having already imposed that duty

upon them, this consideration will tend to show that the restoration of the law to symmetry in this particular will more conveniently come from the legislature than from the courts. Beyond this it does not occur to us that any very convincing argument can fairly be urged against the decision of the court in this case. It cannot, we think, as a general rule, be justly held that towns are any less responsible for the consequences of leaving the highway in an unsafe condition than cities and villages are. If it requires a special statutory enactment to impose any such responsibility upon towns, we do not, upon general principles, very well comprehend why it should not require the same in the case of cities and villages. Our only doubt would be whether the symmetry of the law upon this point might not better be restored by the legislature.

I. F. R.

Court of Errors and Appeals of Mississippi.

PATRICK DEEVER *v.* THE STEAMER HOPE.

State legislatures have no authority to create maritime liens or confer jurisdiction on state courts to enforce such liens by proceedings *in rem.* Such jurisdiction is exclusively in the Courts of Admiralty of the United States.

Suit was brought against a vessel by name, and the vessel attached under the water craft laws of Mississippi, for a debt due plaintiff. Plaintiff made affidavit that defendant was a steamer in the navigable waters of the state, and in his declaration set forth that he was a citizen of Mississippi, and that the "home port" of the vessel was in that state: *Held*, That the court had no jurisdiction, the cause being one of admiralty.

This was an attachment issued by the plaintiff against the defendant, under the provisions of the act, entitled "An Act to provide a remedy by attachment against ships, steamboats and other water crafts," chapter 53 of rev. code, p. 383.

Plaintiff made the affidavit required by article 2 of said act, in which he stated that "the steamboat Hope, a steamer in the navigable waters of this state" was indebted to him in the sum of $339 15, and also executed the requisite bond under the provisions of article 2, and the attachment was sued out, and made returnable to the Circuit Court of Yazoo county; the Sheriff attached certain furniture and other chattels, in and belonging to the boat, which were replevied by Thomas Metzler, the captain of the steamer, under article 3 of the act.

At the return term, the plaintiff filed his declaration on the